

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

No. 76-4021

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ROMAN CATHOLIC DIOCESE OF BROOKLYN AND
ST. LEO'S PARISH, AS JOINT OPERATORS
OF ST. LEO'S SCHOOL,

Respondents.

On Application For Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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(i)

INDEX

	<u>Page</u>
STATEMENT OF THE ISSUES PRESENTED	1
STATEMENT OF THE CASE	2
I. The Board's findings of fact	2
A. Background: The relationship of the Diocese and the Parishes	2
B. Union organizational activity at St. Leo's; a majority of the Lay Faculty sign union authorization cards	6
C. The Union asks for recognition; St. Leo's rejects the Union's request and coercively interrogates and threatens the Lay Faculty	7
II. The Board's conclusions and order	9
ARGUMENT	10
I. Substantial evidence supports the Board's finding that the Diocese and St. Leo's are joint Employers of the Lay Teachers in St. Leo's school	10
II. Substantial evidence supports the Board's findings that the Diocese and St. Leo's violated Section 8(a)(1) of the Act by coercively interrogating their employees concerning their union activities and by threatening their employees with closure of the school and other reprisals if they supported the Union	13
III. The Board's order is valid and proper	18
CONCLUSION	24

AUTHORITIES CITED

Cases:

Ace-Alkire Freight Lines v. N.L.R.B., 431 F.2d 280 (C.A. 8, 1970)	11, 12
--	--------

	<u>Page</u>
Boire v. Greyhound Corp., 376 U.S. 473 (1964)	11
Byrne Dairy, Inc. v. N.L.R.B., 431 F.2d 1363 (C.A. 2, 1970), enf'g, 176 NLRB 312 (1969)	21
Catholic Bishop of Chicago, The, 220 NLRB No. 63 (1975), 90 LRRM 1225	10
Hald, Henry M., High School Ass'n & Roman Catholic Diocese of Brooklyn, 216 NLRB No. 94 and 93 (1975), 88 LRRM 1524 and 1560	10
Hertzka & Knowles v. N.L.R.B., 503 F.2d 625 (C.A. 9, 1974), cert. den. ___ U.S. ___, Oct. 6, 1975, 90 LRRM 2554	22
Luxuray of N.Y., Div. of Beaunit Corp. v. N.L.R.B., 447 F.2d 112 (C.A. 2, 1971)	16
N.L.R.B. v. Chain Serv. Restaurant, etc. Emp., Local 11, 302 F.2d 167 (C.A. 2, 1962)	15
N.L.R.B. v. Checker Cab Co., 367 F.2d 692 (C.A. 6, 1966), cert. den., 385 U.S. 1008	10, 12
N.L.R.B. v. Dayton Coal & Iron Corp., 208 F.2d 394 (C.A. 6, 1953)	12
N.L.R.B. v. Dinion Coil Co., 201 F.2d 484 (C.A. 2, 1952)	17-18
N.L.R.B. v. General Stencils, 438 F.2d 894 (C.A. 2, 1971)	22
N.L.R.B. v. Gibraltar Industries, 307 F.2d 428 (C.A. 4, 1962), cert. den., 372 U.S. 911	10, 11, 13

	<u>Page</u>
N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969)	16, 17, 19, 20, 21
N.L.R.B. v. Greyhound Corp., 368 F.2d 778 (C.A. 5, 1966)	11
N.L.R.B. v. Int'l Metal Specialties, 433 F.2d 870 (C.A. 2, 1970), cert. den., 402 U.S. 907	21
N.L.R.B. v. Jewell Smokeless Coal Corp., 435 F.2d 1270 (C.A. 4, 1970)	10
N.L.R.B. v. Long Island Airport Limousine Serv. Corp., 468 F.2d 292 (C.A. 2, 1972)	15
N.L.R.B. v. Marsellus Vault & Sales, 431 F.2d 933 (C.A. 2, 1970)	21
N.L.R.B. v. Nichols, S. E., Co., 380 F.2d 438 (C.A. 2, 1967)	10-11, 12
N.L.R.B. v. Ochoa Fertilizer Corp., 368 U.S. 318 (1961)	19
N.L.R.B. v. Park Edge Sheridan Meats, 323 F.2d 956 (C.A. 2, 1963)	19
N.L.R.B. v. Rollins Telecasting, 494 F.2d 80 (C.A. 2, 1974), cert. den., 419 U.S. 964	17
N.L.R.B. v. Scoler's, Inc., 466 F.2d 1289 (C.A. 2, 1972)	22
N.L.R.B. v. Sinclair Co., 397 F.2d 157 (C.A. 1, 1968)	16, 17, 21
N.L.R.B. v. Taber Instruments, 421 F.2d 642 (C.A. 2, 1970)	15, 17
N.L.R.B. v. Taylor Mart, 407 F.2d 644 (C.A. 7, 1969)	15

	<u>Page</u>
N.L.R.B. v. Wentworth Institute, 515 F.2d 550 (C.A. 1, 1975)	10
Retired Persons Pharmacy v. N.L.R.B., 519 F.2d 486 (C.A. 2, 1975)	14, 15
Roman Catholic Archdiocese of Baltimore, 216 NLRB No. 54 (1975), 88 LRRM 1169	10
Zim's Foodliner, Inc. v. N.L.R.B., 495 F.2d 1131 (C.A. 7, 1974), cert. den., 419 U.S. 838	16
 Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, <i>et seq.</i>)	2
Section 8(a)(1)	1, 9, 13
Section 10(e)	2, 19

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that Roman Catholic Diocese of Brooklyn and St. Leo's parish are joint employers of the employees.
2. Whether substantial evidence supports the Board's findings that respondents violated Section 8(a)(1) of the Act by coercively interrogating their employees concerning their union activities and by threatening their

employees with closure of the school and other reprisals if they supported the Union.

3. Whether the Board's order is valid and proper.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et. seq.*), for enforcement of its order issued on November 26, 1975, against Roman Catholic Diocese of Brooklyn and St. Leo's Parish, as joint operators of St. Leo's School (hereafter, the "Diocese" and "St. Leo's"). The Board's Decision and Order (A.2-20, 23-27)¹ was issued by a three-member panel of the Board consisting of Members Fanning, Jenkins, and Penello, and is reported at 221 NLRB No. 136. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred in Brooklyn, N.Y.

I. THE BOARD'S FINDINGS OF FACT

A. Background: the Relationship of the Diocese and the Parishes

The Diocese is a religious organization incorporated in the State of New York and a constituent subdivision of the Roman Catholic Church. It operates religious, educational, and related facilities in the Boroughs of

¹"A." references are to the portions of the record printed as an appendix to the parties' briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Brooklyn and Queens in the City of New York (A.3; 49). For administrative purposes, the Diocese has subdivided the geographical area under its jurisdiction into approximately 225 smaller units called "Parishes" (A.3; 32, 45). Each Parish is separately incorporated and owns its own land and buildings (A.34, 54). In addition to operating churches, some 185-190 Parishes operate elementary or parochial schools as well (A.3; 31-32, 61). The Parishes which are financially able to do so pay a portion of their income as "taxes" to the Diocese (A.4; 33-34). On the other hand, the Parishes that are not self-supporting are supplied funds by the Diocese (A.4; 33, 61, 64, 65-66).

The Diocese is headed by a Bishop. Each Parish is headed by a Pastor or Rector who is appointed by a Diocesan Personnel Board, subject to the approval of the Bishop. The Pastor is responsible to the Bishop and may be transferred or removed by him. Other Parish priests are appointed and removed in a similar fashion (A.3; 32-33, 34, 47-48, 73-74). The Parish elementary school is headed by a Principal. In most cases, the Principal is a member of and selected by the religious Order affiliated with the school (A. 3; 36, 57). In some instances, the Principal is a Layman or woman selected by the Pastor, possibly from a "file" of suitable persons maintained for that purpose by the Diocese (A.3; 36-37). The schools are staffed by a combination of religious and lay teachers who are paid a salary and other benefits by the Parishes (A.3-4; 40-41).

The Diocese maintains a so-called "Catholic Schools Office." One of the functions of this Office is to recruit teachers for placement in the elementary schools (A.3; 29). Persons wishing to be employed in the schools are required to fill out an application form prepared by the Diocese and submit it to the Office. The applicants are interviewed by the Office and their applications are maintained on file for inspection by the schools. When the Office receives a request from a school for applicants, the Office

attempts to match the request with the applicants it deems most suitable. It then refers the applicants to the school which also interviews them and selects the ones it wants. Although the schools are not required to seek applicants through the Office, in practice "the vast majority are hired through the Schools Office . . ." (A.3; 34-35, 52-53). Even in cases where applicants are recruited directly by the school, the applicants are required to be interviewed at the Office (A.3-4, n.1; 122, 129-130). If the applicant is hired, the Office thereafter maintains an active personnel file on the person and all other teachers employed throughout the Diocese (A.35-36).

The Office also prepares, publishes and distributes to all teachers a "Personnel Handbook" for the elementary schools, the purpose of which, according to its Introduction, is to "state clearly the benefits and working conditions for all teachers" (A.4; 37-39, 56-57, 231-268). The Handbook describes the hiring process and sets forth the standard "Contract of Employment" mandated by the Diocese and bearing the name of the Diocese on it. This contract, which is signed by the individual teacher and the Pastor of the Parish involved, *inter alia*, obligates the teacher "to observe and enforce the rules prescribed by the Pastor and Principal, and the regulations of the Brooklyn Diocesan Schools Office . . ." (A.3-4, 238-239, 260). The Handbook specifies the wage scales to be paid teachers, based on the amount of their education and their experience. It also enumerates the teachers' fringe benefits, leave policies, retirement, performance evaluation, transfer rights and disciplinary and termination procedures (A.4; 240-259). Among the benefits enjoyed by the teachers are Diocesan-wide group health insurance plans, life insurance plans, and pension plans. While the premiums for these plans are paid solely by the individual Parishes, if a teacher transfers from one Parish school to another, the teacher continues under the plan and maintains whatever credits he or she has earned (A.5; 39-42, 66-67, 74, 86-86, 270). According to the

Diocese, the procedures and terms contained in the Handbook are in the nature of recommendations rather than binding requirements, and not all of the Parishes follow them. Thus, for example, some Parishes pay wages lower than those in the Handbook, and some pay higher (A.4; 56-57).

Decisions concerning the job performance and retention of teachers are made by the Parishes. However, the Office supplies the Parishes with standard forms to be used by them in the case of evaluation or termination of a teacher. After filling out the forms, the Parishes are required to send them to the Office where they are placed in the teachers' Diocesan personnel files (A.5; 35-36, 48, 50-51, 54, 58-59, 67, 261). In most cases the Office also handles transfers of teachers, referring them, when asked to do so, to other schools it considers appropriate. A teacher who transfers retains his or her salary grade and any other credits earned (A.49-50, 55-56, 59-60, 66-67).

Although the State establishes the basic curriculum requirements, the Office supplies information, advice, and assistance to the schools concerning textbooks, programs and courses of study (A.5; 31, 55, 68-69). The Office also provides liaison with the State Education Department and the Public Schools; for a charge, reviews the budgets of the schools and furnishes advice; operates a program, jointly with Fordham University, for the further education of the teachers; and issues a calendar for the school year (A.5; 31, 64-65, 70-73, 86-88, 106, 116-117, 198-199).

St. Leo's Parish is one of the Parishes within the Diocese. It is financially self-supporting. It operates an elementary school in which about 656 students are enrolled in the first through the eighth grades. The Principal of the school is Sister Mary Denis, a member of the religious Order which has been connected with the school for the past fifty years—namely, the Grey Nuns of the Sacred Heart. Sister was chosen for the position by her

Order in January 1971. Generally, the school follows the guidelines recommended by the Schools' Office with respect to salaries and other working conditions. In addition to the Principal, the school's faculty consists of five teaching nuns and some eleven or twelve lay men and women (A.3, 4, 5; 60, 74-76, 77, 79-82, 195-196, 200).

**B. Union Organizational Activity at St. Leo's: a Majority of
the Lay Faculty Sign Union Authorization Cards**

In January or February 1974 about nine of the lay teachers at St. Leo's School held a meeting at one of the teacher's homes. They discussed "the idea of joining a Union." Dennis Farrell, one of the teachers present at the meeting, contacted the Union² but no further action was taken at that time. However, Farrell thereafter continued to receive mail from the Union addressed to him at the school. This mail was placed in his mail box at the school by Sister Mary Denis (A.7; 90-91, 98-99, 121, 225).

In June 1974 Farrell had his annual, year-end evaluation conference with Sister Mary Denis. At that time Sister told him that she was "aware" of the earlier meeting of the teachers concerning the Union and further that she was "aware" that he was receiving mail from the Union because she herself had deposited it in his mailbox (A.12; 92, 101).

The Union organizational campaign resumed at the beginning of the next school year in October 1974. Farrell again contacted the Union and received a number of Union authorization cards. Farrell signed a card and circulated the remaining ones to the other lay teachers. By November 23,

²The Union is "Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO."

1974, a total of seven other teachers also signed cards (A. 6-7, 23-24; 92-93, 99-100, 108, 116, 122-123, 131-132, 144-145, 159, 173-174, 278).³

**C. The Union asks for recognition; St. Leo's Rejects
the Union's Request and Coercively Interrogates
and Threatens the Lay Faculty**

By a letter addressed to Sister Mary Denis and dated November 23, 1974, the Union claimed that a "majority of the lay teachers" at St. Leo's had designated it as their collective bargaining representative and asked St. Leo's to recognize it and enter into bargaining negotiations (A.7; 140, 281). Sister received the letter on Wednesday, November 27, the day before the Thanksgiving holidays. The following Monday, December 2, during the lunch period several of the lay teachers had an angry argument over the Union. Their disagreement was reported that day to Sister Mary Denis. The next day, December 3, Sister drafted and mailed a response to the Union's letter in which she stated that she did "not believe that a majority of my teachers wish to be represented by your organization." Accordingly she refused to have a "meeting" with the Union (A.7, 24; 141, 180-183, 282).

After school that same day, December 3, Sister Mary Denis called Farrell to her office. Also present was another teacher, Kathleen Dietsche, who had the title of "Assistant Principal." Sister had asked Miss Dietsche to be present as "a third party to hear the conversation . . . a witness . . ." Sister began by referring to the Union's recognition demand and said that she wanted to tell Farrell "what my stand on it was, what my thoughts were regarding the letter and regarding an outside organization coming into the school" She further said that she was "aware" of the interest of

³ A ninth teacher signed a card on December 10, 1974 (A.179).

the teachers in the Union; that she "felt that it was detrimental to the school insofar as it was divisive of the faculty;" that it was "divisive" because the religious teachers could not join and because some of the lay teachers were opposed to it; that the teachers enjoyed a number of valuable benefits and she "couldn't understand anything that an outside organization could give that they already didn't have;" that when the employees choose an outside organization to represent them, they lose their rights to speak as individuals; and that she "would do everything within the law to prevent an outside organization from coming into the school" (A.7-8; 93-94, 102, 183-188, 206-209, 218-220, 228).

Sister then asked Farrell what he expected to get from "this outside organization." Farrell replied, "some job security," and Sister said, "there could be no job security because if the outside organization came into the school, the school would close" She also told him that if he "wanted more money, [he] should go elsewhere," and added that he "had excellent potential for leadership, but . . . was moving into the wrong direction and . . . was hurting [his] chances."⁴ Sister also stated that "four Diocesan high schools had closed since the Union was put into the high schools" (A.8-10; 94-95, 103-104, 209-210, 220, 223, 225-226).

The following day, December 4, Sister May Denis addressed a regularly scheduled meeting of the entire faculty. After discussing some school matters, Sister turned to the question of the Union and "basically . . . said the same thing" she has stated to Farrell the previous day. She said that she "would do all within the law to prevent an outside organization coming into the school because I believe it is very detrimental to St. Leo's

⁴The previous year, Farrell had applied for a job as a lay Principal. The qualifications for the position included five years of teaching experience and a recommendation from his Principal. Farrell at that time had asked Sister for such a recommendation and had filed the necessary forms with the Diocese but he "never heard either way" (A.97).

school insofar as it is divisive of the faculty." Sister also said that, "if this outside organization came into the school, the school would not be able to meet the demands of the outside organization and the school would close." Then, looking in the direction of the new teachers, she added that under the Union, "the last one hired was the first one fired" (A. 10-12; 96-97, 104, 108-109, 110-111, 112, 117-118, 123-124, 128, 132-134, 147, 153, 165, 166, 170, 171, 191-192, 200-206, 216, 222, 223, 226)

II. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board found that the Diocese and St. Leo's are joint employers of the lay faculty at St. Leo's. The Board also found that the Diocese and St. Leo's violated Section 8(a)(1) of the Act by coercively interrogating Farrell concerning his Union activities, by telling Farrell that he was hurting his chances for advancement by engaging in Union activities, by threatening Farrell and the other lay teachers with closure of the school if they persisted in their Union activities and by unlawfully refusing to recognize the Union. The Board further found that the unfair labor practices of the Diocese and St. Leo's were sufficiently serious to warrant imposition of a bargaining order (A.5-6, 13-15, 16, 23-24).

The Board's order requires the Diocese and St. Leo's to cease and desist from the unfair labor practices found and from "in any other manner" infringing upon their employees' protected rights. Affirmatively, the Diocese and St. Leo's are directed to bargain with the Union upon request and post appropriate notices (A.18-20, 24-27).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING
THAT THE DIOCESE AND ST. LEO'S ARE JOINT EMPLOYERS
OF THE LAY TEACHERS IN ST. LEO'S SCHOOL

In this case the parties stipulated that the Diocese meets the Board's discretionary standards for assertion of jurisdiction over it but that St. Leo's—individually—does not (A.2-3; 28).⁵ Although St. Leo's before the Board resisted assertion of jurisdiction over it, the Board nonetheless asserted jurisdiction over both the Diocese and St. Leo's by finding that each one constituted *an* employer, jointly with the other, of the lay faculty of St. Leo's school (A.5-6). Since it is well settled that the Board may assert jurisdiction over—and impose joint and several liability on—each joint employer so long as one joint employer satisfies Board jurisdictional standards, see *N.L.R.B. v. Checker Cab Company*, 367 F.2d 692, 693-694 (C.A. 6, 1966), cert. denied, 385 U.S. 1008; *N.L.R.B. v. Gibraltar Industries, Inc.*, 307 F.2d 428, 431 (C.A. 4, 1962), cert. denied, 372 U.S. 911, the only issue here is the correctness of the Board's finding that the Diocese and St. Leo's are in fact joint employers.

In deciding the question of joint employers, the test is whether each entity "possessed sufficient indicia of control over the work of the employees" *N.L.R.B. v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1271 (C.A. 4, 1970). Accord: *N.L.R.B. v. S.E. Nichols Company*, 380 F.2d 438,

⁵The Board asserts jurisdiction over private schools systems which gross \$1,000,000 a year and receive \$50,000 across state lines. See *N.L.R.B. v. Wentworth Institute*, 515 F.2d 550, 553, n.2, 554 (C.A. 1, 1975). The Board in the past has asserted jurisdiction over the Diocese, see *Henry M. Hald High School Assn and Roman Catholic Diocese of Brooklyn*, 216 NLRB No. 94 and 93, 88 LRRM 1524 and 1560 (1975), and the Diocese in this case does not contest this action. Accord: *The Catholic Bishop of Chicago*, 220 NLRB No. 63, 90 LRRM 1225, 1226 (1975); *Roman Catholic Archdiocese of Baltimore*, 216 NLRB No. 54, 88 LRRM 1169, 1170-1171 (1975)

439 (C.A. 2, 1967); *N.L.R.B. v. The Greyhound Corp.*, 368 F.2d 778, 780 (C.A. 5, 1966). This question "is essentially a factual issue," *Boire v. Greyhound Corporation*, 376 U.S. 473, 481 (1964), and the Board's finding is, therefore, entitled to acceptance by the Court where it is supported by substantial evidence, see *Ace-Alkire Freight Lines v. N.L.R.B.*, 431 F.2d 280, 282 (C.A. 8, 1970).

The Board's finding of joint employers in this case is amply supported by the evidence. Thus, St. Leo's, as the nominal employer of its faculty, is clearly an employer of them and neither the Diocese or St. Leo's contends otherwise. The Diocese, however, maintains sufficient control over St. Leo's faculty to be an employer of them also. As set out *supra*, pp. 2-3, despite its separate incorporation, St. Leo's, like all of the Parishes within the Diocese, is basically the creation of the Diocese. Its leader, the Pastor, is appointed by, responsible to, and subject to removal by the Diocese. And although St. Leo's is financially self-sustaining, it, like any other parish in the Diocese, would receive financial assistance from the Diocese if the need arose (*supra*, p. 3). Further, while the Principal of St. Leo's school is selected by her Order, rather than the Pastor or the Bishop directly, it is fair to infer that the Order maintains its affiliation with the school only through the permission of the Pastor and the Bishop. Clearly, therefore, whether it exercises the power or not, the Diocese can if it wishes dictate all actions to be taken by St. Leo's. See *N.L.R.B. v. Gibraltar Industries, Inc.*, *supra*, 307 F.2d at 430.

The Diocese's control over St. Leo's faculty, however, is much more than merely theoretical. The Diocese, as the evidence makes plain, is substantially involved in the employment and working conditions of St. Leo's teachers. Thus, no teacher may be employed by St. Leo's (or any other Parish) unless he or she is first interviewed by the Diocese, which refers the teachers it considers suitable to Parishes it considers appropriate (*supra*,

pp. 3-4). It is apparent, then, that the Diocese exercises both a recruitment function and a veto power with respect to all persons employed by St. Leo's. See *Ace-Alkire Freight Lines v. N.L.R.B.*, *supra*, 431 F.2d at 282; *N.L.R.B. v. Checker Cab Company*, *supra*, 367 F.2d at 698.

Further, the Diocese for all practical purposes establishes all of the basic working conditions of the teachers. Through the "Personnel Handbook" published by its "Catholic Schools Office," the Diocese lists just about every possible term of employment covering the teachers, i.e., wages, fringe benefits, leave policies, retirement, performance evaluation, transfer rights and disciplinary and termination procedures (*supra*, p. 4). See *N.L.R.B. v. S.E. Nichols Company*, *supra*, 380 F.2d at 439; *N.L.R.B. v. Checker Cab Company*, *supra*, 367 F.2d at 698. Although the Diocese claims that the provisions of the "Personnel Handbook" are merely non-binding recommendations, the record, as the Administrative Law Judge noted (A.4-5), warrants the inference that the Handbook's procedures are "generally followed" Admittedly, St. Leo's follows them (*supra*, p. 6).

The Diocese also supplies a number of necessary items to St. Leo's. For example the Diocese furnishes the standard employment contract form which not only contains the name of the Diocese on its heading but also obligates the teacher "to observe and enforce . . . the regulations of the Brooklyn Diocesan Schools Office" (*supra*, p. 4). In addition, the Diocese provides forms for the evaluation or termination of teachers, which St. Leo's and the other Parishes are required to fill out and submit to the Diocese (*supra*, p. 5). Moreover, the Diocese supplies information and assistance concerning textbooks and courses; liaison with the public schools; budget advice; and continuing education programs for the teachers (*supra*, p. 5). See *N.L.R.B. v. Dayton Coal & Iron*, 208 F.2d 394, 395 (C.A. 6, 1953). And the Diocese handles matters involving more than

one Parish, such as transfers from one Parish to another and Diocesan-wide pension and insurance programs (*supra*, pp. 4, 5).

Finally, the record does not suggest any disagreement between the Diocese and St. Leo's concerning the labor relations policies which Sister Mary Denis adopted with respect to unionism among the St. Leo's faculty. It is reasonable to assume, therefore, that the Diocese and St. Leo's are united in opposition to the Union. See *N.L.R.B. v. Gibraltar Industries, Inc.*, *supra*, 307 F.2d at 430-431. In this respect it is noteworthy that the same attorney has represented both the Diocese and St. Leo's throughout this proceeding.

In sum, the evidence here leaves little doubt that the Diocese is not simply an interested bystander but rather an entity vitally concerned with the activities and events surrounding St. Leo's lay faculty. It possesses total theoretical control and a substantial amount of *de facto* control over the faculty's working conditions. It is, therefore, as the Board properly found, an employer, together with St. Leo's, of that faculty.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE DIOCESE AND ST. LEO'S VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING THEIR EMPLOYEES CONCERNING THEIR UNION ACTIVITIES AND BY THREATENING THEIR EMPLOYEES WITH CLOSURE OF THE SCHOOL AND OTHER REPRISALS IF THEY SUPPORTED THE UNION

As set forth *supra*, pp. 6-7, following unsuccessful attempts in the early part of 1974, the lay faculty at St. Leo's resumed organizational activity in November of that year and obtained eight signed Union authorization cards by November 23. On that date the Union sent Sister Mary Denis a letter claiming majority support and demanding recognition. Sister received the letter on Wednesday, November 27, the day before the Thanksgiving holidays. The following Tuesday, December 3, Sister sent

the Union a reply, rejecting its recognition demand assertedly because she doubted the union's majority claim. That same afternoon, Sister called to her office lay faculty member Farrell who, she knew, was the leading Union organizer. In the presence of Assistant Principal Dietsche, her selected "witness," Sister proceeded to tell Farrell in the most explicit possible terms that she was strongly opposed to the employees' organization activity and that she "would do everything within the law to prevent an outside organization from coming into the school" (*supra*, pp. 7-8). Sister then asked Farrell what he expected to get from "this outside organization," and, when Farrell replied, "job security," Sister said, "there could be no job security because if the outside organization came into the school, the school would close" Sister added that Farrell "had excellent potential for leadership, but . . . was moving into the wrong direction and . . . was hurting [his] chances" (*supra*, p. 8).

The next day, after a regularly scheduled meeting of the entire faculty, Sister Mary Denis again brought up the subject of unionism and "basically . . . said the same thing," i.e., that she "would do all within the law to prevent an outside organization coming into the school" She also said that "if this outside organization came into the school, the school would not be able to meet the demands of the outside organization and the school would close" (*supra*, pp. 8-9).

The Board's conclusion that these statements violated Section 8(a)(1) of the Act is plainly correct. Sister Mary Denis' question of Farrell concerning his Union expectations was "coercive in light of all of the surrounding circumstances," *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 492 (C.A. 2, 1975), and therefore unlawful. Thus, the question was asked against an announced background of hostility to unionism; the question was followed immediately by threats which, we show *infra*, pp. 15-17, were

illegal; Sister is the highest ranking person in the immediate school hierarchy; the question was asked in a private interview in Sister's office in the presence of a "witness" and in an atmosphere of unnatural formality; and the question was unaccompanied by any assurances against reprisals. Clearly, most if not all of this Court's indicia for judging findings of illegal interrogation are present and the Board's determination is accordingly entitled to acceptance. *Retired Persons Pharmacy v. N.L.R.B.*, *supra*, 519 F.2d at 492-493, and cases cited; *N.L.R.B. v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 296-297 (C.A. 2, 1972).

Equally unlawful was Sister Mary Denis' threat to Farrell that he "had excellent potential for leadership, but . . . was moving into the wrong direction and . . . was hurting [his] chances." As noted *supra*, p. 8, n. 4, Farrell had previously applied for a position as a lay principal, a job which *inter alia* required a recommendation from Sister Mary Denis. Her statement to him, therefore, was a clear warning that she would withhold from him any such recommendation as long as he persisted in his Union activities. Such a statement is unquestionably illegal. See *N.L.R.B. v. Chain Service Restaurant Employees, Loc. 11*, 302 F.2d 167, 171 (C.A. 2, 1962); *N.L.R.B. v. Taylor Mart*, 407 F.2d 644, 646 (C.A. 7, 1969).

Finally, Sister Mary Denis' statements to Farrell individually and to the entire lay faculty that "the school would close" if the "outside organization came into the school" were also unlawful. It is, of course, well settled that threats to close the place of employment in the event of union success are among the most serious unfair labor practices an employer can commit. See, e.g., *N.L.R.B. v. Taber Instruments*, 421 F.2d 642, 643-644 (C.A. 2, 1970).

Nor could Sister's statements qualify as a lawful "prediction as to the precise effects [she] believes unionization will have on" the school.

N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 618 (1969). For, as the Court in *Gissel* went on to hold, in order to avoid the proscriptions of the Act, a prediction of this kind (395 U.S. at 618-619):

must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof."

Furthermore, the "burden of proving justification" for the employer's claims is, as the First Circuit expressly held in its decision in *N.L.R.B. v. Sinclair Company*, 397 F.2d 157, 161 (1968), on the employer. In the *Gissel* opinion, the Supreme Court specifically approved the First Circuit's approach, stating that it saw "no need to tamper with" the "standards used below for evaluating the impact of the employer's statements" 395 U.S. at 618. Accord: *Luxury of N.Y., Div. of Beaunit Corp. v. N.L.R.B.*, 447 F.2d 112, 116 (C.A. 2, 1971) ("unless the employer can demonstrate objectively that such consequences are the likely result of economic necessity or the application of sound business practice to antecedent facts beyond the employer's control, the 'prediction' " is illegal); *Zim's Foodliner, Inc. v. N.L.R.B.*, 495 F.2d 1131, 1137 (C.A. 7, 1974), cert. denied, 419 U.S. 838 (a "severe burden" has "been placed upon the employer to justify such statements by objective evidence").

Clearly the Diocese and St. Leo's have offered no proof to sustain their burden of substantiating Sister Mary Denis' assertion that unionization might force a closure of the school. Although Sister at one point in her remarks at the faculty meeting appeared to claim that the rationale for her statement was that "the school would not be able to meet the demands of the outside organization" (A.96, 209), she admitted at the hearing that she did not even "know what the demands would be" (A.201). Moreover, the Union, which at that time was recognized by some Diocesan High Schools but not by any elementary schools, had not "formulated any specific monetary demands . . . for elementary schools" (A. 142). Sister at the faculty meeting also "said something to the effect there had been 9 Diocesan high schools, now there are only 5" (A.201, 222). However, the Diocese and St. Leo's offered no evidence that the closing of the High Schools was in any way connected with the Union. Her "prediction," therefore, was just as unfounded as that of the employer in *Sinclair Co. v. N.L.R.B.*, *supra*, which the Supreme Court rejected because the employer "had no support for its basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and [there was] no basis for [the employer's] attributing other plant closings in the area to unionism" 395 U.S. at 619. The Board's finding that Sister's statements relating to school closure were illegal is accordingly fully supported. Accord: *N.L.R.B. v. Taber Instruments*, *supra*, 421 F.2d at 644; *Snyder Tank Corp. v. N.L.R.B.*, 428 F.2d 1348, 1349-1350 (C.A. 2, 1970); *N.L.R.B. v. Rollins Telecasting, Inc.*, 494 F.2d 80, 82 (C.A. 2, 1974), cert. denied, 419 U.S. 964.

Before the Board, the Diocese and St. Leo's attacked the Administrative Law Judge's findings, based on a credibility resolution (A.9-10, 11-12), that Sister Mary Denis made the remarks found unlawful. Of course, it is well settled that such findings are unassailable here unless they are hopelessly incredible on their face. E.g., *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484,

490 (C.A. 2, 1952). Not only are the findings—which are solidly based on the testimony of Farrell and other teachers (*supra*, pp. 8-9)—anything but incredible, but, as the Judge pointed out, they are fortified by several admissions which Sister made on cross-examination. Thus, while Sister initially denied saying anything to Farrell or the faculty about the school closing (A.194, 201), she subsequently conceded that “she said something to the effect that there had been 9 Diocesan high schools, now there are only 5,” and that she also “said something to the effect that if there were too many demands from an outside organization upon the school, and the school couldn’t meet these demands, that possibly the school would have to close. Schools, I think. I don’t even think I put it in singular. Schools would have to close” (A.201, 209). Assistant Principal Dietsche, a witness for the Diocese and St. Leo’s, also confirmed that Sister Mary Denis “referred . . . to high schools, to Diocesan high schools that had been open, and some had closed” and that “Sister Denis said something to the extent that if more money were asked by an outside organization, and parishes could not meet it, the schools would be forced to close” (A.10, n. 8; 222, 223). On this record, then, there can be no question that the Board’s factual findings are plainly correct.

III. THE BOARD’S ORDER IS VALID AND PROPER

As stated *supra*, pp. 6-7, by November 23, 1974, the Union had obtained eight signed authorization cards from the St. Leo’s lay faculty. At that time, the Judge found (A.6-7), there were twelve lay and five religious teachers employed at the school.⁶ The Judge also found that a

⁶The original eight card signers were Farrell, Matos, Mugno, Gatto, DiRocco, Soldt, Van Valen and Glascock. A ninth card was signed by Martelli on December 10 (*supra*, p. 7). The non-signers were Campo, Zanetti and Dietsche and the five religious teachers (A.176-178, 285).

unit limited to the lay faculty members was an appropriate unit and thus that the Union had been validly designated by a majority of the employees in the unit (A.6-7).⁷

Having found that the Union at one point obtained a majority, the Board further found that the unfair labor practices of the Diocese and St. Leo's were sufficiently serious to warrant imposition of a bargaining order (A.15-16, 23). The evidence fully supports this finding. Thus, in *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575 (1969), the Supreme Court sustained the Board's remedial authority to issue a bargaining order in cases similar to this one, where unfair labor practices have been committed "that interfere with the election processes and tend to preclude the holding of a fair election." (395 U.S. at 594). The Court indicated that a bargaining order would be appropriate in two situations: (1) where the employer's unfair labor practices are so "outrageous" and "pervasive" that a bargaining order is the only effective means of remedying those unfair labor practices even in the absence of a Section 8(a)(5) violation or bargaining demand; and (2) where the unfair labor practices, though less substantial, are nonetheless such that "the Board finds that the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun)

⁷ At the hearing the Diocese and St. Leo's introduced evidence suggesting an issue as to the validity of the authorization cards and also stated through their attorney that they were taking the position that the only appropriate unit was one composed of both the lay and religious teachers (A.178). However, as the Judge noted (A.6, n.4), they raised no such issues in their brief to him; and thereafter in their exceptions and brief to the Board (A.21-22) they made no attack upon the Judge's findings concerning appropriate unit and majority. It is well settled that under Section 10(e) of the Act the failure of the Diocese and St. Leo's to urge these issues before the Board by way of proper exceptions precludes review of them by this Court. *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *N.L.R.B. v. Park Edge Sheridan Meats, Inc.*, 323 F.2d 956, 959 (C.A. 2, 1963).

by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order". (395 U.S. at 613-615). The Court noted that:

The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior (395 U.S. at 615).

With respect to the issuance of a bargaining order in such cases where unfair labor practices impede the election processes, the Court set forth the following standards (395 U.S. at 614-615):

In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of past effect on election conditions. . . . If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue

Finally, the Court emphasized that (395 U.S. at 612, n. 32):

It is for the Board and not the courts . . . to make that determination [as to whether a bargaining order is warranted], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of Section 10(c) of the Act . . . , the

Board draws on a fund of knowledge and expertise all its own, and its choice of a remedy must therefore be given special respect by reviewing courts.

Applying these principles to the instant case, it is clear that the unfair labor practices of the Diocese and St. Leo's warrant a bargaining order. As the Judge noted (A.16), the threat by Sister Mary Denis—the top representative of the Diocese and St. Leo's in the school—to deny Farrell a recommendation because of his Union activities and the threat expressed to the entire faculty to close the school if the Union drive succeeded challenged the job security of every unit employee. As such, these threats were comparable in severity to the threats of plant closure in the *Sinclair* case which the Supreme Court held were “so coercive” as to warrant a bargaining order even in the absence of a finding by the Board that such threats would disturb the election process. 395 U.S. at 615. *A fortiori*, such threats justify a bargaining order where, as here, the Board has also made a finding that they would impede the holding of a fair election (A.16). This Court has upheld Board findings of bargaining orders in cases which are not significantly different from the instant one. See *Byrne Dairy, Inc. v. N.L.R.B.*, 431 F.2d 1363, 1364 (C.A. 2, 1970), enforcing, 176 NLRB 312, 316-317 (1969) (single speech by employer to all employees containing veiled references to plant closure and other reprisals in the event of unionization held justifying a bargaining order, the Court stating that it “must uphold the Board when, as here, there is a fair basis for concluding the employer has crossed the line and seriously impaired the likelihood of a fair election”); *N.L.R.B. v. Marsellus Vault & Sales*, 431 F.2d 933, 936, 937, 938 (C.A. 2, 1970) (threats of plant closure, promise of benefits and request that employees withdraw from union made by newly appointed plant manager to several employees held sufficient to warrant bargaining order); *N.L.R.B. v. Intl. Metal Specialists*, 433 F.2d 870, 871, 872-873 (C.A. 2, 1970), cert. denied, 401 U.S. 907 (threats of plant closure and

other reprisals by two supervisors and a unilateral wage increase held justifying a bargaining order, the Court noting that "the violations in this case, marginal though they may appear to some, considerably exceeded the violations in *Sinclair* . . . yet the Court in that case affirmed the Board's use of a bargaining order"); *N.L.R.B. v. Scoler's Incorporated*, 466 F.2d 1289, 1291-1294 (C.A. 2, 1972) (owner's promises of benefits to large group of employees, interrogation, and threats to discharge union supporters and close part of business held sufficient to warrant bargaining order). Compare *N.L.R.B. v. General Stencils, Inc.*, 438 F.2d 894, 902-903 (C.A. 2, 1971).

Before the Board the Diocese and St. Leo's contended that a bargaining order is inappropriate here because most of the teachers who heard Sister Mary Denis' statements did not, according to their testimony at the hearing, assert that they heard anything that sounded like a threat, and thus there is no basis for inferring an adverse impact on them. However, "it is not necessary for all the employees to have heard the remarks; as long as some heard, there was a good chance of an impact upon employee free choice." *Hertzka & Knowles v. N.L.R.B.*, 503 F.2d 625, 628 (C.A. 9, 1974), Board's petition for cert. denied, 90 LRRM 2554 (October 6, 1975).

Moreover, while not all of the teachers testified that they heard Sister's statements in the same way that Farrell, for example, did, most of them did state that they heard Sister link closure of the school with unionism in one way or another.⁸

⁸Thus, Sister Mary Denis said, according to Matos (A.109):

If this outside organization would be brought to the school, financially the school could not meet its demands and if this outside organization came in, because of the financial demands, the school would have to close.

(continued)

⁸(continued)

According to Mugno (A.118):

She said when the Diocesan High Schools started there were nine and now there were five and they belonged to the outside organization.

According to Gatto (A.128):

If we participated in union activity that the school could close
She referred to the High Schools . . . after they had unionized that some of them had closed.

According to DiRocco (A.133):

If it is job security you want, you have it now. With an outside organization, the school will close and you will have no jobs.

According to Soldt (A.153):

If it is job security you want, jobs are only secure as long as the schools are open.

According to Van Valen (A.165, 166):

She went on to talk about the point of job security, if this was a point that we were looking for in a union, that the union can't guarantee job security, that we have jobs as long as the schools were open and working, functioning.

According to Campo (A.170, 171):

She mentioned that if it was security that we were concerned with, having an outside organization doesn't necessarily insure security. Insuring security would be if the schools were open and as an example she gave some high schools that had to shut down, that did shut down and they had outside organizations in there and those people had no more security than we did because there were no schools.

According to Zanetti (A.216):

She didn't see how having an outside organization could help in job security.

According to Dietsche (A.222, 223, 226):

Sister referred, I believe, to high schools, to Diocesan high schools that had been open, and some had closed. . . . I believe Sister Denis said something to the extent that if more money were asked by an outside organization, and parishes could not meet it, the schools would be forced to close. . . . She said we had job security. As long as schools are open, we have job security.

When considered in light of Sister's vigorously stated opposition to the employees' union activities, we submit that each of the versions of Sister's remarks which the employees thought they heard amounted to either direct threats or unlawful—because unsupported—predictions of economic harm stemming from the employees' organizational efforts. On such a record, then, there can be no real doubt of the adverse impact of Sister's assertions.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

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April 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)	
)	
Petitioner,)	
)	
v.)	No. 76-4021
)	
ROMAN CATHOLIC DIOCESE OF)	
BROOKLYN AND ST. LEO'S PARISH, AS)	
JOINT OPERATORS OF ST. LEO'S)	
SCHOOL,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 21st day of April, 1976.